160 US 121

CERTIFICATE.

160-121

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894

No. 550

STEPHEN M. FOLSOM, PLAINTIFF IN ERROR,

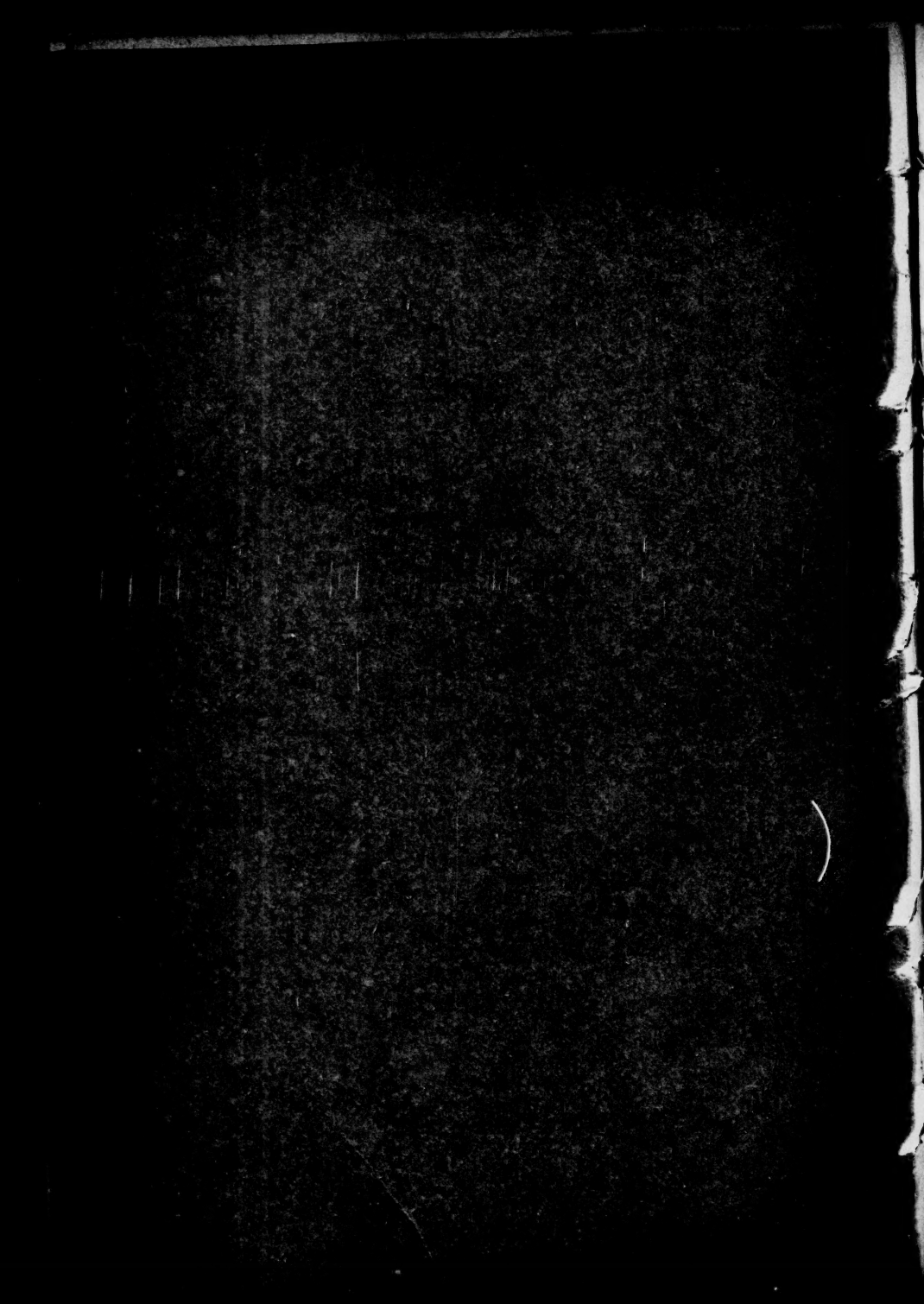
vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 9, 1895.

(15,820.)



(15,820.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 936.

STEPHEN M. FOLSOM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of judges	1	1
Statement of facts	1	1
Question certified	3	2
Clerk's certificate	4	3

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 19, 1895.

1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

STEPHEN M. FOLSOM, Plaintiff in Error, *vs.* THE UNITED STATES OF AMERICA, Defendant in Error.	}	No. 579. In Error to the Supreme Court of the Territory of New Mexico.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this eleventh day of February, 1895, hereby certifies that upon the record on file in said court in the case wherein Stephen M. Folsom is plaintiff in error and The United States of America are defendants in error, which is now pending before this court upon a writ of error duly issued to the supreme court of the Territory of New Mexico, the following facts are made to appear:

First. At a regular term of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, held at Albuquerque, in said district, the plaintiff in error, Stephen M. Folsom, was, on the 15th day of March, 1894, indicted by the grand jury in said court for making certain false entries in violation of the provisions of section 5209 of the Revised Statutes of the United States.

Second. He was thereafter arraigned. He pleaded not guilty. He was tried by the said district court and a jury, was found guilty of making certain of the false entries charged in said indictments in violation of the provisions of section 5209, and was thereafter, on the 14th day of April, 1894, ordered and adjudged by the said court to be confined at hard labor in the territorial penitentiary at Santa Fé, New Mexico, for the term and period of five years upon each of the seven separate and distinct offences as laid and charged in the fourteen counts of the indictments upon which the jury had theretofore returned a verdict of guilty; and it was further

2 ordered and adjudged by the said court that said term upon each of the said offences should run concurrently each with the others, and that the defendant pay the costs to be taxed, and that execution issue therefor.

Third. The said Stephen M. Folsom then appealed from said judgment to the supreme court of the Territory of New Mexico, and his case upon said appeal was heard and tried by the said supreme court August 27, 28, and 29, 1894; was on the latter day submitted to and taken under advisement by said court, which, on September 4, 1894, adjudged that the judgment of the district court of the second judicial district aforesaid be affirmed, and that said Folsom be confined in the New Mexico penitentiary at Santa Fé, New Mexico, for the full term of five years, pursuant to the said judgment of the district court.

Fourth. On the 9th day of November, 1894, a writ of error was duly issued out of the United States circuit court of appeals for the

eighth judicial circuit to the supreme court of the Territory of New Mexico, commanding the said court to send the records and proceedings and the judgment in said case between The United States of America, plaintiff and appellee, and Stephen M. Folsom, defendant and appellant in said supreme court, with all things concerning the same, to this circuit court of appeals for the eighth circuit, together with said writ, so that the same should be filed in the office of the clerk of this court on or before the first day of January, 1895, to the end that, the records and proceedings aforesaid being inspected, the United States circuit court of appeals for the eighth circuit might cause further to be done therein to correct the error of which the said Folsom had complained what of right and according to the law and custom of the United States should be done, and pursuant to that writ the clerk of the supreme court of the Territory of New Mexico made due return and transmitted to this court a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in said case before January 1, 1894, and the said case is now pending in this court.

Fifth. January 7, 1895, the United States of America filed a motion to dismiss the writ of error on the ground that this circuit court of appeals has no jurisdiction to hear and determine
3 the issue raised thereby or to review the said judgment of the supreme court of the Territory of New Mexico, and the said motion has been argued and submitted to this court for decision.

Sixth. The errors in the judgment and proceedings of the supreme court of the Territory of New Mexico which are assigned by Stephen M. Folsom, the plaintiff in error, in his complaint, upon which the said writ of error was issued from this court, are such that if upon due consideration upon the merits they should be sustained the judgment of the said supreme court ought to be reversed.

And the said United States circuit court of appeals further certifies that, to the end that it may properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed, the said court desires the instruction of the Supreme Court of the United States upon the following question:

Has the United States circuit court of appeals for the eighth judicial circuit any jurisdiction to hear and determine the issue presented by said writ of error and to review the judgment and proceedings of the supreme court of the Territory of New Mexico?

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the said eighth circuit, have hereto set their hands this eleventh day of February, A. D. 1895, at the city of St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
U. S. Circuit Judges for the Eighth Circuit.

4 UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Stephen M. Folsom, plaintiff in error, *versus* The United States of America, defendant in error, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this eleventh day of February, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

5 [Endorsed:] (Original.) U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 579. Stephen M. Folsom, plaintiff in error, *vs.* The United States of America. Certificate of question by United States circuit court of appeals for the eighth circuit to the Supreme Court of the United States. Filed Feb. 11, 1895. John D. Jordan, clerk.

Endorsed on cover: Case No. 15,820. U. S. circuit court of appeals, eighth circuit. Term No., 936. Stephen M. Folsom, plaintiff in error, *vs.* The United States. Filed March 9th, 1895.

FILED.
APR 6 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

STEPHEN M. FOLSOM, PLAINTIFF IN error,
v.
THE UNITED STATES.

No. ~~920~~ 550

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

STEPHEN M. FOLSOM, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 936.

MOTION TO ADVANCE.

This is a certification by the circuit court of appeals for the eighth circuit of a question as to its jurisdiction.

The defendant was indicted in the district court of the second judicial district of the Territory of New Mexico, under section 5209 of the Revised Statutes, for making false entries in the books of the Albuquerque National Bank of New Mexico, of which he was president. He was convicted on seven counts, and sentenced to five years (concurrent) imprisonment on each count. He appealed to the supreme court of the Territory of New Mexico, where the judgment of the lower court was affirmed, and sued out a writ of error from the circuit court of appeals. A motion to dismiss was made in the circuit court of appeals by the defendant in error, on the ground that the convic-

tion was of "an infamous crime," and that, therefore, the court was without jurisdiction of the writ of error. The question certified by the circuit court of appeals is—

> Has the United States circuit court of appeals for the eighth judicial circuit any jurisdiction to hear and determine the issue presented by said writ of error, and to review the judgment and proceedings of the supreme court of the Territory of New Mexico?

The defendant is out on bail in the sum of $15,000, since December last, awaiting the decision of this court.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such early day during the next term as may be convenient to the court.

Counsel for the plaintiff in error consent to this motion.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

STEPHEN M. FOLSOM,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

No. 550.

On Certificate from the Circuit Court of Appeals for the Eighth Circuit.

MOTION FOR AN ORAL ARGUMENT.

CHARLES A. WILLARD,
Attorney for the Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

STEPHEN M. FOLSOM,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

No. 550.

On Certificate from the Circuit Court of Appeals for the Eighth Circuit.

And now comes the plaintiff in error, by Charles A. Willard, one of his attorneys, and moves this court for an order allowing an oral argument of the said cause, and to that extent modifying the order heretofore entered therein, on the 15th day of April, 1895.

And the said plaintiff in error says that at the March term, 1894, of the district court for the Territory of New Mexico, sitting at Albuquerque for the trial of causes arising under the Constitution and laws of the United States, the plaintiff in error, Folsom, was convicted of making false entries in the books of the Albuquerque National Bank, he being then the president of said bank, in violation of section 5209 of the Revised Statutes. He

appealed from the judgment of conviction to the supreme court of the Territory of New Mexico, where the judgment was affirmed. He then sued out a writ of error from the circuit court of appeals for the eighth circuit to the said supreme court of the Territory of New Mexico. When said cause was docketed in the circuit court of appeals, the Government moved to dismiss the writ of error on the ground that the said circuit court of appeals had no jurisdiction. Said motion was argued at the December term, 1894, of said court, at St. Louis, and thereupon said circuit court of appeals, of its own motion, certified to this Court the question as to whether it had jurisdiction in the said cause or not.

The cause having been docketed in this court, the Solicitor-General, on April 8, 1895, submitted a motion to have the same advanced for hearing at the October term, 1895.

On April 15, 1895, this court made an order advancing the said cause, " as under the 32d Rule, to be submitted on printed briefs on Tuesday after the second Monday of October next."

And the plaintiff in error says that, under the published rules of this court, he is entitled to an oral argument of the said cause.

And the plaintiff in error says that he has not had until this time a reasonable opportunity to move this court for a modification of its said order of April 15, 1895.

CHARLES A. WILLARD,
Attorney for the Plaintiff in Error.

STATEMENT.

In support of the foregoing motion, the plaintiff in error relies upon the proposition that he is, under the rules and

otherwise, entitled to an oral argument as a matter of right. And he refers to the brief of Governor Hoadly upon this question in the case of—

Pittsburgh, etc., Railway Company et al. v. *Keokuk & Hamilton Bridge Company*, 155 U. S. 156.

filed in this Court on April 7, 1894.

The appellants in that case were granted an oral argument. It does not appear, however, whether it was upon the ground above stated or not. It is nevertheless true that there is no published rule of this court, so far as I know, which requires this case to be submitted on printed briefs.

The plaintiff in error also suggests that he did not bring this case here, and has made no motion to have it advanced. Believing that there was somewhere a review of federal cases, arising in the Territories, in a federal court, and having in mind that the purpose of the act creating the circuit courts of appeals was the relief of this court, he took his case there. That court, of its own motion, certified it here.

That they should have so certified it after argument indicates that they deemed it doubtful.

The case is important to all residents of the Territories, for its decision here determines whether they have any right of review in a federal court of some civil cases and most criminal cases arising in the Territories under the Constitution and laws of the United States.

Governor Hoadly, in his brief above referred to, after citing authorities to show that the rules should not be changed in particular instances, said:

"It is enough at this time to say that if there be any cases in which oral argument should be encouraged, they are those in which the circuit courts of appeals have found

it impossible to reach satisfactory conclusions without the advice of this court. It is not to be presumed that such cases come here without reason. They are reserved because of serious doubt in reaching right results, owing to the difficulties encountered by the circuit court of appeals in answering to their own satisfaction the questions submitted to this court by these learned tribunals."

Respectfully submitted.

CHARLES A. WILLARD,
Attorney for the Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

STEPHEN M. FOLSOM,
vs.
THE UNITED STATES.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

The plaintiff in error in this case was indicted, tried and convicted in the district court of the second judicial district of the Territory of New Mexico at the March Term, 1894, for a violation of the provisions of section 5209 of the Revised Statutes of the United States, the offence being one which, under the decisions of this court, is to be considered infamous. He then appealed to the supreme court of the Territory, and in that court the judgment of the court below was affirmed. A writ of error was then sued out from the United States circuit court of appeals for the eighth circuit to remove the cause into that court for review. After the case was docketed in that court the United States moved to dismiss the writ of error on the ground that the circuit court of appeals had no jurisdiction of the case; and the question of jurisdiction has been certified to the Su-

preme Court under the provision contained in the thirp paragraph of section 6 of the act of Congress creating circuit courts of appeals. The question to be now decided is, in substance, as to whether the circuit court of appeals has jurisdiction to review a judgment of the supreme court of a Territory in a case of conviction of an infamous crime under the laws of the United States.

Inasmuch as no court of the United States, except the Supreme Court, has any jurisdiction whatever unless conferred by Congress, it is obvious that the resolution of this question must depend upon what is to be found in the statute creating circuit courts of appeals, and declaring their jurisdiction. The jurisdiction of these courts over the judgments of supreme courts of the Territories is conferred by section 15 of the act of Congress, the wording of which is such that it becomes necessary to consider in connection with it sections 5 and 6 of the same act. As a matter of convenience the three sections are here quoted as follows:

"Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.

And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

Excepting that in every such subject within its appellate jurisdiction, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made fina there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

Judiciary Acts. This court has repeatedly held that the courts of the Territories are not courts of the United States within the meaning of the Constitution.

Good vs. Martin, 95 U. S., 90.

Insur. Co. vs. Canter, 1 Pet., 511.

Benner vs. Porter, 9 How., 235.

Clinton vs. Englebrecht, 13 Wall., 435.

Hornbuckle vs. Tombs, 18 Wall., 648.

Reynolds vs. United States, 98 U. S., 145.

It is, therefore, clear that the appellate jurisdiction conferred upon this court by section 5 of the act of 1891, in cases of infamous crimes, does not extend to such cases in the Territories. If there is any appellate jurisdiction over such territorial cases, it must be found elsewhere in the statute.

A careful reading of section 15 of the statute will show that Congress, while attempting to specify the cases in which circuit courts of appeals shall exercise appellate jurisdiction over the supreme courts of the territories, has not declared that they shall be the *same cases* as those which may be reviewed when going up from the district or circuit courts. The jurisdiction is to be exercised "in cases in which the judgments of the circuit courts of appeals are made final by this act." To ascertain what this language means, we must go back to the second paragraph of section 6. By the first paragraph of section 6, appellate jurisdiction is conferred on the new courts to review judgments of the district and circuit courts "in all cases other than those provided for in the preceding section." This paragraph creates the principal portion of the jurisdiction of the circuit courts of appeals. The same appellate jurisdiction to review judgments of the supreme courts of the territories is conferred by section 15; but not in the

same cases, as the latter section does not extend to "all cases other than those provided for" in section 5 of the act. It extends only to those cases in which the judgments of the circuit courts of appeals are made final by the act. By the second paragraph of section 6, which can and should be read as a separate and substantive provision of law, it is declared that the judgments of the circuit courts of appeals shall be final in certain enumerated cases, a portion of which never could arise in the Territories, but it does not declare that these cases must have come up from district or circuit courts. If the act treated of nothing but cases arising in district and circuit courts, of course this second paragraph of section 6 could not relate to any other cases; but section 5 provides for cases coming from a different kind of court. Let us suppose that Congress in the further exercise of its constitutional power, should ordain and establish other inferior courts; should at its next session create a new class of courts theretofore unknown in our judicial system, and should, in broad terms, confer upon the circuit courts of appeals appellate jurisdiction over such new courts: There can be no doubt that the second paragraph of section 6, and, indeed, all the rest of the section which follows, would be held applicable to these new courts, and to the exercise of the appellate jurisdiction over them; and that judgments of the circuit courts of appeals would be final in those cases enumerated in the second paragraph and that the appellate jurisdiction would extend to all cases arising under the criminal laws, whether infamous or otherwise, and in all admiralty cases, whether they were prize causes or otherwise.

If such new act of Congress declared merely that the circuit courts of appeals should have appellate jurisdiction over the new courts in cases in which the

judgments of the circuit courts of appeals are made final by statute, these new courts would be put in the exact situation of the supreme courts of the Territories.

Section 6 is not the only section which confers jurisdiction on the circuit courts of appeals. Section 13 confers jurisdiction. So does section 15. Section 6, *so far as it confers jurisdiction*, relates exclusively to cases arising in States. Section 13 relates exclusively to cases arising in the Indian Territory, and section 15 relates exclusively to cases arising in the other Territories.

Section 6, so far as it confers jurisdiction, in no event could cover a case arising in a Territory, even though such case did not fall within the terms of section 5. Section 6 gives "appellate jurisdiction to review . . . . . final decision in the district courts and the existing circuit courts" only.

That part of section 6 which declares what judgments are final, is a distinct and substantive part of the law. It is not dependent on what precedes it in the section. It relates to all cases that may get into the circuit courts of appeals, whether they come in through the first part of section 6 or through section 13 or through section 15. It must be construed as if it stood in a section by itself. It is no more bound to the first part of section 6 than it is to section 13 or to section 15. It does not declare that the judgments of the circuit courts of appeals shall be final only in those criminal, revenue, patent and admiralty cases which get there through the first part of section 6, that is, from a federal court sitting in a State, but it declares that its judgments shall be final in all such cases.

whether coming from a State, Indian Territory or any other Territory.

Section 15 gives the circuit courts of appeals jurisdiction to review the judgments, orders and decrees of the Supreme Courts of the Territories, in patent, revenue, admiralty and criminal cases arising under the laws of the United States; and if the section had stopped there no doubt could have arisen. The word "same" causes the trouble. Was that word used with the intention of limiting the jurisdiction, which, in the first part of the section is conferred? Was the word not rather used to indicate that the jurisdiction should be of the same general character, and should be exercised in like manner as in cases arising in states?

Webster's definition of the word "same" would support such a construction:

"2. Of like kind, species, sort, dimensions, or the like, not differing in sharacter, or in the quality or qualities compared; corresponding; not discordant, similar; like."

If this section had said that the circuit courts of appeals should have jurisdiction "in like manner" or should have "like" jurisdiction, instead of "same" jurisdiction, the construction contended for would have been reasonably plain.

It seems probable that the framer of the bill intended to allow a man who got to the supreme court of a Territory with his case, to take it to the circuit court of appeals if he could be stopped there; but not to allow him an appeal to the supreme court of the Territory, a second appeal to the circuit court of appeals, and a third to the Supreme Court.

Without doing violence to the letter of the act, with-

out changing a single word, a transposition of some of its phrases may properly be made, and may, perhaps make its meaning clearer. That such method of examining a statute is proper, is supported by high authority.

United States vs. Bassett, 2 Story, 406.

Matthews vs. Commonwealth, 18 Gratt., 992.

In the case last cited the court went to great length in the transposition of a statute so as to avoid evident absurdity. A statute of Virginia read as follows:

"An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing, verified by the oath of a competent witness; but no person shall be put upon trial for any felony unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction, or upon the certificate of the committing justice."

The court of appeals held that the last phrase, "or upon the certificate of the committing justice" should be placed after the words, "a competent witness."

It will be seen that in this Virginia case the transposition did violence to the literal meaning of the statute as it stood; but the transposition which we now suggest in the language of section 15 does no such violence to the statute as it stands. If that section were made to read as follows, it is clear that the meaning is the same as in the printed statute, yet it strengthens the contention of the plaintiff in error:

"That the circuit courts of appeals shall have the same appellate jurisdiction by writ of error or appeal, to review the judgments, orders and decrees of the supreme courts of the several Territories, in cases in which the judgments of the circuit courts of appeals are made final by this act, as by this act they may have to review the judgments, orders and decrees of the district and circuit courts."

This reading emphasizes the suggestion hereinbefore

made, that while the jurisdiction to be exercised is the same, or of like character, the subjects of that jurisdiction are not declared to be the same, but may be quite different. It is clear that the circuit courts of appeals cannot have jurisdiction over the supreme courts of the Territories in *all* cases in which their judgments are to be final as declared in the second paragraph of section 6, because no case can arise in the Territories in which the jurisdiction is dependent upon the diverse citizenship of the parties; so that jurisdiction over cases from the Territories must be limited to all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases. The present case is certainly one arising under the criminal laws of the United States, and by the most literal reading of the statute, it is included within the appellate jurisdiction conferred by section 15 of the statute.

Stated in the briefest possible way, the argument on this point is as follows:

In order to deny the jurisdiction for which we contend, it must be assumed that the only cases "in which the judgments of the circuit courts of appeals are made final by this act," are those coming up from district or circuit courts; but this is not so according to the letter of the act. Those judgments are made final in certain kinds of cases, no matter whence those cases come.

It is sometimes useful to refer to the definition of well known terms in order to throw light upon their use in

a statute or other instrument which may be the subject of construction. With this in view it may be well to consider the meaning of "jurisdiction" and "appellate jurisdiction."

Jurisdiction, when applied to a court, is generally defined to be the "power to hear and determine," and appellate jurisdiction is the power to review and revise the proceedings of another court. Bearing this definition in mind, it will be seen that section 15 confers upon the circuit courts of appeals, in cases in which their judgments are declared to be final by the act, the same power to review the judgments af the supreme courts of territories that they have to review the judgments of the district and circuit courts. The section merely declares that they shall have the same power; but does not indicate that that power shall be exercised over the same cases as when they are reviewing the judgments of the district and circuit courts. An early case in the circuit court for the District of Columbia illustrates this distinction which we seek to draw, and is both interesting and instructive.

The case was one where the defendant was convicted of an offense against the criminal laws at a special session of the circuit court held in September, 1833. One of the objections to the validity of the conviction was that it was had at a special session. The circuit court for the District of Columbia was created by the act of Congress of February 27, 1801, and by the third section of that act it was enacted "that the said court and the judges thereof shall have the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." The jurisdiction of the court was conferred by the fifth section of the act, and that section in its first clause, declared "that the said court shall have cognizance of all crimes

and offenses committed within said District." There was nothing in this act directly authorizing the court to hold special sessions, but the circuit courts of the United States were, by the judiciary act of 1789, given "power to hold special sessions for the trial of criminal causes." The offense was not one of a federal character.

It was argued, as it now is with regard to the circuit courts of appeals, that the act conferring powers and jurisdiction upon the circuit court for the District of Columbia, must be closely and strictly construed and that the third section conferring the powers of circuit courts of the United States, should not extend to a particular or special power like that of holding special sessions, but gave only the general powers of circuit courts; but, if it should be held that the power of holding special sessions was given, then the power must be confined to the trial of criminal causes of a purely federal character, such as would be cognizable by a circuit court of the United States sitting in a State. It is quite obvious that the circuit courts sitting in the States, had no power to hold special sessions for the trial of criminal causes other than those of offenses committed against the United States; the circuit court in the District of Columbia had only the same powers as the circuit courts of the United States; therefore the circuit court for the District of Columbia had power to hold special sessions, if at all, only for the trial of persons accused of crimes against the United States. This appears to be a logical conclusion. True, the jurisdiction was more extensive than that of the circuit courts in the States, but jurisdiction is only a power,—"the power to hear and determine,"—and the fact that that power was applicable to cases which did not fall within the jurisdiction of the circuit

courts in the States, would not appear to warrant the conclusion that the other powers should be more extensive, or should be applicable to any other or different things than the powers of the circuit courts in the States. The circuit court held, however, in a most interesting, elaborate and convincing opinion, that those other powers of the court should be extended to everything within its jurisdiction, that there was a manifest distinction to be drawn between jurisdiction and power, —although as above stated jurisdiction itself is a power,—and that all the powers which were possessed by circuit courts in the States as to causes within their jurisdiction, were possessed by the circuit court in the District of Columbia and should be exercised as to all cases within its jurisdiction.

U. S. vs. Williams, 4 Cr. C. C., 375, et seq.

Now, in the act creating the circuit courts of appeals, those courts, by the 15th section of the act, are to have the same appellate jurisdiction to review the final judgments of the supreme courts of the Territories that they have to review the final judgments of the district and circuit courts. This power to revise the judgments of Territorial courts may well be held to extend to other cases than those to which it applies when they come up from the district and circuit courts, just as the powers of the circuit court in the District of Columbia, which were to be the same as those of the circuit courts of the United States, were held to extend to causes and proceedings which were not, and could not be, the subject of the powers of the latter courts.

II.

In order to deny the jurisdiction it is necessary to make an unwarranted interpolation in section 15 of the act.

In order that section 15 should have the meaning

sought to be given to it by the government, it ought to read as follows:

"That the circuit courts of appeals in cases in which, *if tried or decided in the district or circuit courts*, the judgments of the circuit courts of appeals would be final by this act, shall have the same appellate jurisdiction, by writ of error or appeal, to review judgments, orders and decrees of the supreme courts of the several territories, as by this act they may have to review the judgments, orders and decrees of the district and circuit courts."

This version of section 15 is what the government contends that the section really means; but we insist that there is nothing in the statute as it stands to justify the interpolation of the words which are printed in italics, and without those words, no such meaning can reasonably be given to the section.

III.

To sustain the jurisdiction is in accordance with the obvious spirit, intent and object of the statute.

It is undoubtedly a fact, as has been declared by this court, that the principal object of the creation of the circuit courts of appeals was to relieve the Supreme Court; yet a consideration of the condition of the law in regard to appeals and writs of error in federal cases, prior to 1891, will clearly show that Congress, in creating the new courts, had in view another purpose, not less clearly defined, to extend the right of appeal, and to show greatly increased liberality in permitting a review of all questions or cases, and perhaps more especially in criminal cases than in any others, even though the main purpose was thereby seriously interfered with.

That this is one of the clear objects of the statute

has already received judicial recognition in more than one case.

Warner vs. Railway Co., 4 C. C. A., 672.

The Alejandro, 6 C. C. A., 56.

The Mattano, 3 C. C. A., 326.

Under the new act there is no case triable in the district and circuit courts which may not be reviewed, either in the circuit courts of appeals, or in this court, while prior to 1891, there were comparatively few cases which could be the subject of such review.

By section 631 of the Revised Statutes it was provided that appeals should be allowed to the circuit court from the final decrees of the district courts "in causes of equity, or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars." By the new act all such decrees are reviewable, irrespective of the amount involved.

By section 633 of the Revised Statutes, final judgments of a district court in civil actions, where the matter in dispute exceeded the value of fifty dollars, might have been reviewed in the circuit court upon a writ of error. By the new act all civil actions tried in the district courts can be reviewed in the circuit court of appeals without regard to the amount involved.

By section 651 of the Revised Statutes, whenever any question occurred on the trial of any criminal proceeding before the circuit court, upon which the judges were divided in opinion, the point upon which they disagreed might be certified to this court for decision; and this was for many years the only approach to criminal appellate jurisdiction possessed by this court, except such as it may have had of a very limited character by way of *certiorari*, and *habeas corpus*. By the

new act every criminal case tried in a district or circuit court is reviewable by writ of error either in this court, or in the circuit court of appeals.

By section 691, of the Revised Statutes, all final judgments of circuit courts in civil actions, where the matter in dispute did not exceed $2,000, could not be reviewed anywhere; while under the new act, there is no judgment of any circuit court which is not a subject of appellate jurisdiction.

By sections 695 and 696 of the Revised Statutes, appeels were to be allowed to this court from final decrees of district and circuit courts in prize cases where the matter in dispute exceeded the value of $2,000, and might be allowed without reference to the value, on a certificate of the judge that the adjudication involved a question of general importance. By the new act, this court is authorized to review all final sentences and decrees in prize cases without any reference to the amount involved.

By an act of Congress of June 23, 1874, this court was for the first time, vested with appellate jurisdiction in criminal cases, but these cases were limited to convictions in the supreme court of the Territory of Utah, where the accused had been convicted of a capital crime or of bigamy or polygamy. By another act of February 6, 1889, similar jurisdiction was given to this court in all cases of conviction of capital crimes. By the new act this jurisdiction, so far as it relates to cases in district and circuit courts, was extended to all cases of infamous crimes, and the circuit court of appeals was clearly given jurisdiction in all other criminal cases arising in the district and circuit courts.

By an act of Congress of March 3, 1879, the circuit courts were given jurisdiction by writ of error in all criminal cases tried before the district courts where the

sentence was imprisonment or fine and imprisonment, or where, if a fine only, the fine should exceed the sum of three hundred dollars. By the new act, the appellate jurisdiction of this court and of the circuit courts of appeals, extends to all criminal cases.

Prior to 1891 there appears to have been no appellate jurisdiction over criminal cases except as above stated.

To deny to a person convicted in a territory of an infamous crime, the right to have his case reviewed in one or the other of the appellate tribunals provided by Congress, is to do violence to the clear purpose and intent of Congress, and to the general spirit of the statute.

The purpose is clear greatly to facilitate the review of criminal cases. Judgments of ~~district and~~ circuit courts in criminal cases were not, before 1889, directly reviewable anywhere, and after that time only capital cases could be reviewed. On division of opinion in circuit courts, questions might be certified to this court for decision, and upon applications for writs of *habeas corpus* and *certiorari* it was possible to get a review of a limited class of questions. The decisions of the supreme courts of territories in criminal cases, except as to Utah, were not reviewable at all except to the limited extent possible in *habeas corpus* and *certiorari* proceedings. The present act clearly makes all criminal cases decided in the district and circuit courts reviewable either in this court or in the circuit courts of appeals, and it clearly makes decisions of supreme courts of territories in criminal cases under the laws of the United States, reviewable in the circuit courts of appeals—the only doubt to be resolved in the present case, being as

to whether that jurisdiction extends to "all cases arising under the criminal laws" of the United States, as specified in section 6, or only to a portion of such cases, and that portion, of the most unimportant and insignificant character.

It may be argued that legislative intent can be discerned in the statute to make cases of infamous crimes reviewable in this court and not in the circuit court of appeals. This may well be true, but this is a minor purpose, subordinate to the general intent to make all such cases reviewable in an appellate court. We fear that we would have to take a most extraordinary liberty with the statute before we could put into it a declaration of the jurisdiction of the Supreme Court over our case. It is needless to say that such a construction would be quite satisfactory to plaintiff in error, who seeks only an opportunity of having his case reviewed upon its merits by one of the appellate tribunals authorized by Congress to pass upon such matters.

IV.

To deny the jurisdiction leads to the most absurd results.

It is quite clear as to criminal cases tried in the district and circuit courts that a writ of error will lie from this court in all cases of infamous crimes, and from the circuit courts of appeals in all other criminal cases. This is clearly stated by Judge Sawyer, who says that the criminal appellate jurisdiction given to the circuit court of appeals would seem to

be jurisdiction of those minor offences in which writs of error were allowed by the act of March 3, 1879, where the imprisonment is not in the state prison or penitentiary, and the crime therefore is not infamous.

United States vs. Sutton, 2 C. C. A., 117.

Stokes vs. United States, 9 C. C. A., 152.

It is perfectly clear that, as to cases from the district and circuit courts, the jurisdiction of the circuit courts of appeals is limited to minor offenses not infamous; and that at least so much jurisdiction is clearly given by section 15 to review judgments of the supreme courts of the territories. Now, if it is to be held that jurisdiction is denied in prize causes and in cases of conviction of infamous crimes, we must impute to Congress the absurd intention of providing for the review of unimportant and trivial cases, while those of a higher grade are not reviewable at all. The answer to this might well be that courts are not concerned with the consequences of legislation, but are bound by what the legislature has stated in a statute no matter what may be the result. We admit that this is correct as a general proposition, but we deny that Congress has said anything of the kind. Moreover, if language could be found in the statute susceptible of such construction, we urge that the courts are never justified in adopting a meaning for a statute which imputes folly to the legislature, if any other construction can be found which will avoid that. More especially is this the case where such imputation of folly and such an absurd result can be reached only by doing violence to the clear language of the statute.

In an early case going up to the circuit court of appeals for the Eighth Circuit, from the Territory of New Mexico, the strongest argument set forth in the opinion

of the court against taking jurisdiction, is upon the same ground as that above suggested. In that case judgment for the sum of $245 in the district court for Bernalillo County was affirmed by the supreme court of the Territory, and the defendant sued out a writ of error and brought the case to the circuit court of appeals for the Eighth Circuit.

The plaintiff in error contended that by the provisions of section 6 of the act of Congress the judgments of the circuit courts of appeals, where the matter in controversy did not exceed $1,000 besides costs, were final, and that by section 15 the circuit courts of appeals could review the judgments of the supreme courts of Territories in cases in which the judgments of those courts were made final by the act.

The circuit court of appeals held that the language of section 15 must be limited to the classes of cases specially enumerated in the first clause of section 6, and that unless a case could be brought within one or more of those classes, the judgment could not be reviewed. The court then went on to say:

"Unless this be the construction given to the statute we would have, following the contention of counsel for the plaintiff in error, the absurd result that the judgments of the supreme courts of the Territories could be appealed to the circuit courts of appeals in all cases wherein the amount in controversy does not exceed one thousand dollars, but in all cases where the amount in controversy exceeds that sum no appeal could be taken. No possible reason can be advanced in support of the proposition that Congress intended to create a right of appeal applicable to cases involving small amounts and deny the right in cases involving large sums. The absurdity of the result is the strongest posssible argument against the correctness of such a construction of the statute; for as is said in *Lau Ow Bew vs. U. S., 144 U. S., 47-59, 12 Sup. Ct. Rep., 517,* 'nothing is better settled than that statutes should receive a sensi-

ble construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd result'."

Badaracco vs. Cerf, 3 C. C. A., 493-4.

It would seem that the plaintiff in error in the Badaracco case could find, in the terms of the statute, much stronger support for his position than there is for the limited and narrow meaning which the government seeks to give to section 15. That section provides that the circuit court of appeals shall have jurisdiction in all cases in which its judgments are made final by the act, and there can be no possible doubt that the effect of the 6th paragraph of section 6 is, in all cases other than those in which judgments are previously declared to be final, to make the judgments final when the amount involved does not exceed $1,000. If the judgments in such cases are final, why should not section 15 be held to confer jurisdiction over such cases when decided in the supreme courts of the Territories? The letter of the act would seem to favor such construction: but a complete answer is to be found in the argument set forth in the above quotation, and that is, in brief, that it would lead to an absurd and unreasonable result.

The opinion of the circuit court of appeals in the Badaracco case, emphasizes the position hereinbefore taken that the second paragraph of section 6 should be read as a distinct and substantive piece of legislation, not necessarily connected with or modified by what is to be found in the preceding or subsequent paragraphs.

There is nothing to conflict with the construction herein contended for, to be found in any opinion of any court which has had occasion to consider these sections of this act of Congress. It is true that the precise point has not been raised in any previous case, but it is

interesting to note that there has not been a single word or phrase in any opinion indicative of a different view. It has been repeatedly declared that the circuit courts of appeals have jurisdiction and their judgments are final in all cases arising under the criminal laws. The language of this court in one case reads very much as though the distinction for which we contend had been present in the mind of the writer of the opinion. We quote as follows:

"By section 702 of the Revised Statutes and the act of March 3rd, 1885 (23 Stat. at L. 443, chap. 355,) the final judgments and decrees of the supreme courts of the Territories, where the matter in dispute exclusive of costs, exceeded the sum of $5000, might be reviewed or reversed or affirmed in this court upon a writ of error or appeal in the same manner and under the same regulations as the final judgments and decrees of a circuit court. By the fifth section of the judiciary act of March 3, 1891 (26 Stat at. L. 826) it was provided that appeals or writs of error might be taken directly to the supreme court from the district and circuit courts in six classes of cases therein enumerated, neither of which classes includes the pending case. By the sixth section the circuit courts of appeals, established by the act, were to exercise appellate jurisdiction to review by appeal or writ of error final decisions of the district and circuit courts in all cases other than those provided for in the fifth section, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals were made final in all cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States; in all cases arising under the patent laws; the revenue laws; the criminal laws; and in admiralty cases. The case at bar falls under none of these heads.

By the fifteenth section it was provided that the circuit courts of appeals in cases in which the judgments or decrees of those courts were made final by the act, should have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders

and decrees of the supreme courts of the Territories, as by the act they might have to review the judgments, orders and decrees of the district and circuit courts. This section does not apply to this case because it is not one of the cases in which the judgments or decrees of the circuit courts of appeals are made final by the act."

Shute vs. Keyser, 149 U. S., 650-1.

"By the 15th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517) the circuit courts of appeals in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders or decrees of the supreme courts of the several Territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and citizens of the United States, or between citizens of different States, it did not belong to either of the classes defined by section six of that act, as cases in which the judgments or decrees of the circuit court of appeals should be final, and therefore the circuit courts of appeals for the Eighth Circuit properly declined to take jurisdiction."

Aztec Co. vs. Ripley, 151 U. S., 80.

In considering the same case from which the last quotation was made, the circuit court of appeals made use of the following language:

"The case at bar does not come within any one of the classes wherein the judgment of this court is declared to be a finality. It is not a case in admiralty nor does it arise under the criminal, revenue or patent laws of the United States, nor is it a case between aliens and citizens of the United States, nor between citizens of different States; and therefore it does not belong to any of the classes of cases in which this court is clothed with appellate jurisdiction."

Aztec Co. vs. Ripley, 3 C. C. A., 389.

A similarly absurd condition, if the jurisdiction is denied in the present case, would necessarily result with regard to cases in admiralty if any such should arise in a Territory. It is provided by section 5 that prize causes arising in the district and circuit courts of the United States shall be reviewable in this court and by section 6 the decrees of the circuit courts of appeals are made final in admiralty cases. Prize causes constitute an important part of admiralty jurisdiction. It has been held by this court that the general grant to Territorial courts of the jurisdiction of circuit and district courts of the United States, confers jurisdiction in admiralty cases.

City of Panama, 101 U. S., 453.

If a case of an infamous crime decided in a Territorial court, cannot be reviewed in the circuit court of appeals, by the same reasoning a prize cause in such a court could not be reviewed, and it would follow that two classes of cases which, if arising in the federal courts in the States, are of such importance that they are made reviewable in the highest tribunal in the country, become, when decided in a Territory, of such little importance that they cannot be the subject of any appellate jurisdiction provided by the act of 1891, but, indeed, are of less importance than cases which, in the States, would be considered of the inferior and insignificant kind, all other criminal and admiralty cases arising in Territories being undoubtedly reviewable in the circuit courts of appeals.

Such absurd, inconsistent and illogical results must be avoided if any way can be found for the courts to do so, and we submit that we have pointed out a reasonable and consistent reading of the statue which avoids all absurdity and is clearly in harmony with the obvious

intent of Congress.

In a recent case this court has had occasion to construe the sixth paragraph of section 6 of the act which declares that in all cases not made final in the circuit court of appeals, there shall be of right a review of the case by this court where the matter in controversy shall exceed one thousand dollars. An intervening petition had been filed in a railroad foreclosure suit, claiming damages occasioned by the negligence of receivers appointed in that suit. A decree was entered in favor of petitoner for $5,000 which was affirmed on appeal in the circuit court of appeals for the Eighth Circuit. Appeal was then taken to this court, where the appeal was dismissed for lack of jurisdiction. A literal reading of the sixth paragraph would seem to be against this conclusion; but the court in its opinion shows that the jurisdiction of the circuit court in the main case was dependent entirely upon the diverse citizenship of the parties and therefore by the second paragraph of section 6, the decree of the circuit court of appeals would be final in such case; that it was under that jurisdiction that appellee intervened; and that the right of appeal could not be more extensive in an ancillary and supplemental proceeding than in the main case. In concluding its opinion, the court states, in support of its conclusion, the same kind of argument which we urge in the present case:

"We are unable to attribute to Congress the intention of allowing final orders on every incidental controversy involving over $1,000 to be brought to this court for review, while denying such review of the principal decree although involving millions."

Rouse vs. Letcher, 15 Sup. Ct. R. 226.

V.

Were it necessary to do so, the Court would depart from a literal reading of the Act to carry into effect the obvious intent of Congress.

This court has more than once acted upon this doctrine and it needs but a brief discussion here. We will content ourselves with but little more than a mere reference to a few cases which appear to be especially pertinent. One of these is as to the construction to be given to the first paragraph in section 5 of the act creating circuit courts of appeals, which confers jurisdiction upon this court in cases involving the jurisdiction of the court below,—a class of cases which by the first paragraph of section 6 would seem to be excluded entirely from the appellate jurisdiction of the circuit courts of appeals. A literal interpretation of the statute would exclude from the jurisdiction of the circuit courts of appeals every case in which the jurisdiction of the court below is in issue. This court has refused to adopt any such narrow view of the meaning of the act in an opinion which considers as controlling, the general object of the legislation and the purposes to be effected by it.

McLish vs. Roff, 141 U. S., 667-8.

Following this decision, a circuit court of appeals has refused to dismiss a writ of error, the motion for dismissal being upon the ground that the only question in issue was the jurisdiction of the court below. It appears from the opinion in that case that the record did show that the only question involved was the one of jurisdiction, but, in harmony with the opinion of this court, it was held that the writ of error should not be dismissed because it was brought to review a final

judgment: that it brought up the entire case: and that if the circuit court of appeals was of the opinion that the court below had jurisdiction, there would still remain for determination the question whether or not the complaint stated facts sufficient to constitute a cause of action.

Crabtree vs. Madden, 4 C. C. A., 409.

Am. Refining Co. vs. Johnson, 9 C. C. A., 115.

There can be no serious question as to the correctness of these decisions, and they are based upon the sort of construction of the statute, harmonious with its general intent, which we ask the court to adopt in the present case.

In Vermont, the first section of a statute provided that the homestead should be exempt from all debts of the deceased contracted after December 1, 1850, except as was afterwards provided in the act. The sixth section provided that such homestead should be subject to attachment and execution upon any contract that might be made previous to, or at the time of, the purchase of said homestead. The fourth section provided that "if any head of a family shall decease leaving a widow, his homestead, of the value of five hundred dollars, shall wholly pass to his widow and children, if any there be, in due course of descent, without being subject to the payment of the debts of the deceased, unless made specially chargeable thereon, or for the taxes assessed thereon."

Not withstanding the broad, clear and apparently unequivocal language of the fourth section, the court held that the legislature did not intend to cut off debts made prior to December 1, 1850, and that the section must be limited to an exemption only of such

debts as were made after that date or after the purchase by deceased of the homestead "and this to effectuate the general intent of the legislature and to prevent injustice."

Simonds vs. Powers, 20 Vt., 354.

"It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience but no further."

Becke vs. Smith, 2 M. & W., 195.

"The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them, according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act or to some palpable and evident absurdity."

Att'y. Gen. vs. Lockwood, 9 M. & W., 396.

"General words in a statute must receive a general construction; unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, rnd not by arbitrary addition or retrenchment."

Beckford vs. Wade, 17 Ves., 91.

This court in construing the language of section 6 of the act of Congress of May 6, 1892, which section refers to the different Chinese persons other than laborers who may be entitled to come within the United States, has departed from what at the first glance would appear to be the clear letter of the statute, and, notwithstanding that Congress declared that the certificate prescribed by the statute should be the "sole evidence

permissible on the part of the person so producing the same to establish a right of entry into the United States," has held that the phraseology of the section involves "the exaction of the unreasonable and absurd condition of a foreign government certifying to the United States facts in regard to the place of abode and the business of persons residing in this country, which the foreign government cannot be presumed to know, and the means of information in regard to which exists here," unless the statute should be so construed as to apply only to Chinese residing in some foreign country and about to come for the first time into the United States.

Lau Ow Bew vs. U. S., 144 U. S., 60.

See also

Siemens vs. Sellers, 123 U. S., 286.

In the year 1858 the supreme court of California had occasion to construe the *habeas corpus* act of that state which provided that the "writ of *habeas corpus* may be granted by the supreme court in term time or by any judge of such at any time whether in term or vacation."

The broad language of this statute would appear to authorize the issuance of the writ by any judge in any part of the state upon the application of any person restrained of his liberty in any other part of the state: but the supreme court held that this could not have been the intention of the legislature and limited *habeas corpus* proceedings to the county of the local judge. We quote as follows:

"The legislature can never have intended that a party imprisoned under sentence of conviction for a misdemeanor should have the privilege of selecting from the judiciary of the whole state the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him, at the expense of the county, it may be from San Diego to Kla-

math, in order that he might avail himself of a remedy which the local judge of his county was equally authorized to grant.

Nor need he stop here: The refusal to discharge by one judge is not a bar to another application before a different judge. After failing in his first application, the party may sue out another writ before a different officer, and thus the term of his imprisonment may be passed in traveling from one part of the State to another, at the expense of the county in which he was convicted, to the entire subversion of justice. Such a construction would lead to manifest absurdity. As it is the duty of courts to execute all laws according to their true intent and meaning, that intent, when collected from the whole and every part of the statute taken together, must prevail even over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction and absurdity.

'When a particular construction of a statute, applied to a case which it seems by its terms to include, there follows from such a construction an absurd consequence, respect for the legislature will induce the court from thence to conclude that some other construction which will not produce such a consequence, ought to be adopted, hence every construction which leads to an absurdity, ought to be rejected.' (Smith's Com. 663.)

'It is said that this rule should be followed, even in cases where there is neither obscurity nor anything equivocal in the law itself, for the reason that the absurdity of the literal sense of the law does not proceed merely from obscurity or any other fault in the expression, but from the narrow limits of the human mind, which can not foresee all cases and circumstances, or include all the consequences of what is ordained: That it is impossible for the legislature to enter into immensity of detail. It can only make laws in a general manner and in applying their acts to particular cases, the construction ought to be conformable to the intention of the legislature. It cannot be presumed that the legislature intended anything absurd. When, therefore, the words, when taken in the obvious and proper sense, lead to it, it is necessary to turn them from that sense just as far as is sufficient to avoid an

absurdity, if, from the whole perview of the law, and giving effect to all the words used in it, it may fairly be done." (Ib. 664; U. S. vs Fisher 2 Cranch. 400.)

Testing the *habeas corpus* act by the rules; looking at the evil provided against and the remedy afforded, the motives and objects of the legislature in passing it, and the manifestly absurd consequence which may result from a different construction; we conclude that the writ of *habeas corpus* should not issue to run out of the county, unless for good cause shown—as the absence, disability, or refusal to act of a local judge—or other reasons—showing that the object and reason of the law requires its issuance."

Ex Parte Ellis, 11 Cal., 224-5.

In conclusion, we respectfully submit to the court that we have shown that jurisdiction over this case is conferred upon the circuit court of appeals by the letter of the act creating that court; that to sustain such jurisdiction is necessary to effectuate the obvious intent of Congress; and that to deny the jurisdiction would lead to most absurd and unreasonable results, to avoid which the court would, if necessary, even disregard the positive language of the statute.

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SEP 28 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

STEPHEN M. FOLSOM, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 550.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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OCTOBER TERM, 1895.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

Folsom, the plaintiff in error here, late president of the Albuquerque National Bank of New Mexico, was on the 15th day of March, 1894, indicted under section 5209, Revised Statutes, for making certain false entries in the books of the bank. He was tried, convicted, and on the 14th day of April, 1894, sentenced to be confined at hard labor in the Territorial penitentiary at Santa Fe, N. Mex., for the term of five years for each of the seven distinct offenses charged in the fourteen counts of the

indictment. But it was ordered by the court that the several terms for which he was sentenced should run concurrently.

From this judgment Folsom appealed to the supreme court of the Territory of New Mexico, by which court the judgment of the district court was on September 4, 1894, affirmed.

On the 9th of November, 1894, a writ of error was issued out of the United States circuit court of appeals for the eighth circuit to the supreme court of the Territory of New Mexico.

On January 7, 1895, the United States moved to dismiss the writ of error on the ground that the circuit court of appeals was without jurisdiction to hear and determine the appeal, or to review the judgment of the supreme court of New Mexico.

The circuit court of appeals certifies to the Supreme Court of the United States that the errors assigned in the judgment of the supreme court of New Mexico "are such that, if upon due consideration of the merits they should be sustained, the judgment of the said supreme court ought to be reversed." And also the following question:

HAS THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH JUDICIAL CIRCUIT ANY JURISDICTION TO HEAR AND DETERMINE THE ISSUE PRESENTED BY SAID WRIT OF ERROR AND TO REVIEW THE JUDGMENT AND PROCEEDINGS OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO?

ARGUMENT.

The act to establish the circuit court of appeal 26 Stat., 826, provides:

> SEC. 15. That the circuit court of appeals in cases in which the judgments of the circuit courts of appeals are made final by this act, shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories, as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts, and for that purpose the several Territories shall by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

By order of the Supreme Court of May 11, 1891, the Territory of New Mexico was assigned to the eighth judicial circuit. (139 U. S., 707.)

By section 5 of the act to establish the circuit court of appeals it is provided:

> That appeals or writs of error may be taken from the district court, or from the existing circuit courts, direct to the Supreme Court in the following cases: * * * In cases of conviction of a capital or otherwise infamous crime.
>
> SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district court and the existing circuit courts *in all cases other than those* provided for in the preceding section of this act, unless otherwise provided by law.
>
> And the judgments or decrees of the circuit court of appeals shall be final in all cases * * * arising under the criminal laws. * * *

In determining, then, the extent of the jurisdiction conferred upon the circuit court of appeals in respect to judgments and decrees of the supreme courts of the Territories, it is necessary to ascertain what are the classes of "cases in which the judgments of the circuit courts of appeal are made *final* by this act."

It is manifest that the judgments of the circuit courts of appeal can only be final in cases in which such court has jurisdiction to hear and determine.

It is equally clear that the circuit court of appeals has jurisdiction to adjudicate only in all cases other than those as to which appellate jurisdiction is conferred upon the Supreme Court by section 5 of the court of appeals act.

That section 5 confers upon the Supreme Court exclusive appellate jurisdiction "in cases of conviction of a capital or otherwise infamous crime." In all cases of conviction of crime, not capital or otherwise infamous, appellate jurisdiction is conferred upon the circuit court of appeals by section 6.

So that it would seem to follow of necessity that the circuit courts of appeal do not have jurisdiction to review the judgments of the supreme courts of the several Territories "in cases of conviction of a capital or otherwise infamous crime."

The lengthy and learned brief for the plaintiff in error discloses nothing by way of argument which can disturb this conclusion. On pages 11 and 15 of that brief it is insisted that to sustain the denial of the jurisdiction of the circuit court of appeals to review the judgments of

the supreme courts of the Territories involves a construction of the statute which limits such appeals to judgments rendered in cases "tried or decided in the district or circuit courts." It is not at all apparent from the reasoning of the brief just how this conclusion is reached, but it is apparent that it results from misapprehension of the meaning of the statute. It evidently refers to section 15, which provides:

> That the circuit court of appeals, in cases in which the judgments of the circuit courts of appeal are made final by this act, shall have the same appellate jurisdiction by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories, as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court to be made from time to time, be assigned to particular service.

Now this language is very plain and its meaning intelligible, and it does not admit of reasonable misapprehension. What is the extent of the jurisdiction of the circuit court of appeals to review the judgments, orders, and decrees of the district court and circuit courts? The answer will be found in section 6. It is to review by appeal or by writ of error the final decisions of those courts "*in all cases other than those provided for in the preceding section of this act.*"

What cases are provided for in the preceding section? Section 5 provides—

That appeals or writs of error may be taken from the district court or the circuit courts direct to the Supreme Court in the following cases:

* * * * *

In cases of conviction of a capital or otherwise infamous crime.

* * * * *

That is, that the circuit court of appeals shall have jurisdiction by appeal or writ of error in all cases in which the appeal or writ of error does not lie "directly to the Supreme Court." And the purpose of this is manifest. It is to deny to the circuit court of appeals and to confer upon the Supreme Court jurisdiction in those criminal cases in which the punishment is death or confinement in the penitentiary for more than a year.

The circuit court of appeals for the eighth circuit has repeatedly held that it has no jurisdiction to review by writ of error or appeal a judgment or decree of the supreme court of the Territory of New Mexico, unless the case be one in which the judgment of the circuit court of appeals is made final by the provisions of section 6 of the act of March 3, 1891. *Badarocco* v. *Cerf et al.*, 53 F. R., 169; *Aztec Mining Co.* v. *Ripley*, 53 F. R., 7.

In all other criminal cases than those in which the conviction is of a capital or otherwise infamous crime, the circuit court of appeals has jurisdiction to review the final judgments of the supreme courts of the Territories.

The learned counsel appear to have misapprehended the meaning of the court in the case of *Badarocco* v. *Cerf*.

THE VIOLATION OF SECTION 5209, REVISED STATUTES, IS AN OFFENSE THE PUNISHMENT FOR WHICH IS IMPRISONMENT NOT LESS THAN FIVE YEARS NOR MORE THAN TEN, AND IS, THEREFORE, AN INFAMOUS CRIME.

In *In re Claasen*, 140 U. S., 204, this court said:

> It was held in *ex parte Wilson*, 114 U. S. 417, that a crime punished by imprisonment for a term of years at hard labor is an infamous crime within the meaning of the fifth amendment of the Constitution of the United States.
>
> See also *Mackin* v. *United States*, 117 U. S., 348; *Parkinson* v. *United States*, 121 U. S., 281; *United States* v. *De Walt*, 128 U. S., 393; *Medley*, petitioner, 134 U. S., 160–169; and *In re Mills*, 135 U. S., 263–267.
>
> The purport of rulings in these cases is that a crime which is punishable in the State prison or penitentiary, as to the crime of which the defendant was convicted, is an infamous crime, whether the accused is or is not sentenced or put to hard labor; and that in determining whether the crime is infamous the question is whether it is one for which the statute authorizes the court to award an infamous punishment and not whether the punishment ultimately awarded is an infamous one.
>
> So, it is clear that the crime in the present case is an infamous crime, although it does not appear that section 5209, or the sentence imposed, expressly provided for punishment at hard labor.

In that case Claasen was indicted under section 5209.

In *United States* v. *De Walt* (supra) the defendant was tried and convicted upon an information of the crime of embezzlement and making false entries as the president of a national bank, in violation of section 5209 of the

Revised Statutes, and was sentenced and committed to the penitentiary for ten years. He was subsequently discharged on habeas corpus upon the ground that the crime in question was an infamous crime, for which he could not, under the Constitution, be held to answer on information, but only on presentment or indictment by a grand jury. From the order discharging him the appeal was taken to this court, and here it was affirmed.

In *Parkinson* v. *United States*, supra, the defendant was tried on an information for violations of sections 5511 and 5512.

The court said:

> As the imprisonment may be for a period longer than one year the court can order that it shall be in the penitentiary. (Rev. Stat., 5541.) This makes the crime infamous within the meaning of the fifth amendment of the Constitution of the United States, and the prosecution should have been by indictment and not by information.

From these cases and from many others to the same effect which might be cited, it seems that the quality of "infamous" is imparted to an offense, not by reason of the character of the offense itself, nor because of its common-law character as "felony" or "misdemeanor," or because of its heinousness or the presence of moral turpitude involved in it, but solely by reason of the punishment which the court is authorized to impose.

When Congress has declared an offense it is what Congress has designated it, and not what any other system of jurisprudence or foreign statutes may prescribe.

When Congress prescribes a penalty against the offender which operates a degradation from his civil rights such penalty is infamous and the crime is thereby infamous.

The legislative understanding of the words "infamous crime" is manifested in certain acts of Congress. For example, the act of June 17, 1870, chap. 133, sec. 1, 16 Stat., 153, was "An act to establish a police court for the District of Columbia."

That act creates a police court and confers upon it jurisdiction of offenses in the District, "not being capital or otherwise infamous crimes; that is to say, of assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary."

This legislative and judicial interpretation of the words "infamous crime" promotes the constitutional and legislative purpose, which undoubtedly was to secure persons accused of crimes, grave as to the degree of punishment attached, a more considerate and higher order of procedure than to those charged with crimes whose consequences are less serious to the offender. Confusion sometimes results from considering "infamous crimes" and "felonies" as meaning the same thing. All felonies are infamous, but all infamous crimes are not necessarily felonies.

Infamy attaches to a misdemeanor as well as to a felony where the former, like the latter, is punishable by imprisonment in the penitentiary. A misdemeanor may be an infamous crime, but can not be a felony.

If the nature of an offense is to be determined by its designation and not by its punishment, then a bank presi-

dent who robs his bank of a million dollars is guilty only of a misdemeanor under section 5209, and no infamy whatever attaches to the offense, although he may be imprisoned for it ten years in the penitentiary, while the thief who steals five dollars may be convicted of a felony and deprived of his most valuable civil rights.

Violation of section 5209 is a misdemeanor, but the penalty prescribed is imprisonment for not less than five nor more than ten years.

HOLMES CONRAD,
Solicitor-General.

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